No. 82-2143

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN, INC., SUCCESSOR BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

VS.

JAMES C. BAIR,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Supreme Court

REPLY BRIEF OF PETITIONER

JOHN C. SHEPHERD
GERALD D. MORRIS
PAUL N. VENKER
SHEPHERD, SANDBERG & PHOENIX, P.C.
One Mercantile Center - Suite 3000
St. Louis, Missouri 63101
314/231-3332
Counsel for Petitioner,
Burlington Northern, Inc.

DONALD E. ENGLE
ERIC A. CUNNINGHAM, JR.
Law Department
Burlington Northern Railroad

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF AUTHORITIES

No. 82-2143

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN, INC., SUCCESSOR BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

vs.

JAMES C. BAIR,
Respondent.

On Petition For Writ of Certiorari
To The Missouri Supreme Court

REPLY BRIEF OF PETITIONER

Petitioner offers three short responses to new matter raised by respondent in his Brief in Opposition.

I

In addressing the issue of whether a present value instruction must be given, respondent purports to brief the recent decision of *Jones and Laughlin Steel Corp.* v. *Pfeifer*, ____U.S.____, 76 L.Ed.2d 768, 103 S.Ct.____(decided June 15, 1983). In describing *Jones*, respondent makes it sound as though with this case this Court has reversed its long-held position that a present value instruction is mandatory, as announced in *Chesapeake and Ohio Railway Company* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916). [See pages eight and nine, respondent's brief in opposition].

The focus of petitioner's point of error regarding the present value instruction is to have this court declare that an FELA defendant in Missouri State Court can exercise its right to have a present value instruction given to the jury. See *Louisville and Nashville Railroad Company* v. *Holloway,* 246 U.S. 525, 528, 62 L.Ed. 867, 38 S.Ct. 397 (1918), (relying on *Kelly, supra,* for this very rule). *Jones* reaffirms *Kelly, supra* and makes clear that *Kelly* is *the* decision requiring an award to be reduced to present value. *Jones and Laughlin Steel Corp.* v. *Pfeifer,* ____U.S.____, 76 L.Ed.2d at 783, [9]. In fact, the reason *Jones* set aside the judgment therein below was because in "performing its damages calculation, the trial court applied the theory of *Kaczkowski* v. *Bolubasz,* 491 Pa. 561 (1980), which was a "total offset" theory of valuation, . . . even though petitioner had insisted that if compensation was to be awarded, it 'must be reduced to its present worth.' " *Jones and Laughlin Steel Corp.* v. *Pfeifer,* ____U.S.____, 76 L.Ed.2d at 792. (emphasis added). Thus, despite respondent's statements in its brief in opposition, this Court rejected a "total offset" rule as the proper valuation rule. *Id.*

It is clear then that *Jones, supra,* safeguards the rule that an award for lost earnings must be reduced to its present value. Respondent's diversionary trek through various formulae involving inflation and its possible effect on an award fails to obscure the principle that a defendant is absolutely entitled to a present value instruction. *Jones and Laughlin Steel Corp.* v. *Pfeifer, supra,* is one more link in the strong chain of authority supporting that proposition.

II

Respondent's brief in opposition (pages six to seven) implies that petitioner's tendered present value instruction was properly refused by the trial court under Missouri practice because it was offered as a separate instruction instead of being submitted as a modification of Missouri's Approved Instruction 8.02.

In fact, under Missouri Approved Instruction practice, *any deviation* of an approved instruction is presumed error. Therefore, under Missouri practice, whether the present value issue is presented as a modification of MAI 8.02 or as a separate instruction is of no practical consequences. Submission of the issue either way is presumed error. Further, the Missouri Supreme Court did not reject the tendered instruction because it was submitted on a separate sheet of paper. They rejected it because the issue of present value simply cannot be submitted to a jury under Missouri Approved Instructions. It is that basic issue petitioner desires to have reviewed by this Court.

Respondent contends that the present value issue was actually argued during the course of petitioner's final argument. That is incorrect. Copies of the cited pages of the transcript, pertinent portions of which are attached here for reference as Exhibit A (pages 608, 609 and 640). These clearly show that petitioner's argument was an attempt to put into perspective how much money $418,000.00, the amount sought by plaintiff, really is. There was no suggestion or mention of a reduction of future losses to present value. Argument as to reduction to present value was at that time contrary to Missouri law and prohibited. *Dunn* v. *St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 254 [16, 17-20] (Mo. banc 1981).

III

In an attempt to justify the Missouri court's refusal of petitioner's tendered income tax instruction, worded precisely the same as the instruction approved by this Court in *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980), respondent sets out his damage evidence in great detail. Apparently he is trying to demonstrate that the verdict was reasonable in view of claimed injuries. He omits the undisputed fact that he has had no surgery and intends to have none even though he is claiming a bulging low back disc. He also omits Dr. Harmon's testimony that he has a

progressive disease in his low back which began before the occurrence of January 18, 1973, and continued thereafter. Further, respondent omits from his recitation of his evidence Dr. Harmon's testimony that much of the back condition could not be attributed to the January 18, 1973 occurrence, but was in substantial part due to his back disease.

More importantly, respondent neglects to inform the Court that his contributory negligence was a dominant issue in the case, submitted by appropriate instruction to the jury. Probably the jury verdict reflects a mitigation for contributory negligence. This cannot be stated with complete certainty because Missouri requires general verdicts even in FELA cases. However, it is a fair response to respondent's recitation of his injuries as justification for the size of the verdict, to point out that the verdict size also probably reflects a reduction because of plaintiff's contributory negligence. Certainly, the size of the verdict ($315,500.00) cannot be said to demonstrate that petitioner was not prejudicially harmed by the instructional deficiencies for which petitioner now seeks review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be allowed to issue from this Court to the Supreme Court of the State of Missouri.

Respectfully submitted,

John C. Shepherd
Gerald D. Morris
Paul N. Venker
Shepherd, Sandberg &
Phoenix, P.C.
One Mercantile Center - Suite 3000
St. Louis, Missouri 63101
314/231-3332
Counsel for Petitioner,
Burlington Northern, Inc.

Donald E. Engle
Eric A. Cunningham, Jr.
Law Department
Burlington Northern Railroad

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Petitioner were hand delivered to the office of C. Marshall Friedman, Attorney for Respondent, 1133 Pine Street, St. Louis, Missouri, by the undersigned this 8th day of September, 1983.

GERALD D. MORRIS

APPENDIX

EXHIBIT A

Defendant's closing argument, by Mr. Morris

[Tr. 608] Maybe $418,000—I don't know how much, I can't even think how much $418,000 is. Maybe it's not much to him. But it is to me. And it is to the men, the supervisors that you saw out there. That's a lot of money. That's more money that I can imagine, $418,000. You receive $400,000 at 6 percent and you have got over $25,000 a year income. That would be nice, wouldn't it? That would be nice. That would be nice. Jim Bair comes up here, he gets $400,000, he [Tr. 609] goes back and he sells real estate. And you know what a real estate license means? It doesn't mean much right now, the market is a little slow. But in a year when the government lets go of the money again, you won't be able to keep up with the housing demand. And so we have a man who comes up here and asks you to give him, just on interest, a $25,000 income a year. Then he's going to go down and sell real estate. He's got a license. I just want you to think about that a minute.

****

[Tr. 640] We're supposed to give him enough money so he can sit down today and draw $25,000 interest—interest. I wish somebody would do that for me. You could almost have one of my discs if you'd do that for me, you know.

****